No. 20,444

United States Court of Appeals

For the Ninth Circuit

J. D. MALLON and CHELLIE MALLON,
Appellants,

vs.

UNITED STATES OF AMERICA,
Appellee.

APPELLANTS' OPENING BRIEF

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JURISDICTIONAL STATEMENT

This is an appeal from a final judgment entered on October 31, 1964, by the United States District Court for the Northern District of California, Northern Division. The underlying action was brought by the United States to condemn certain property under the power of eminent domain and of the authority of the Act of Congress approved February 26, 1931 (46 Stat. 1421, 40 U. S. C. 258(a) and acts supplementary thereto and amendatory thereof, and under the further authority of the Acts of Congress approved April 24, 1888 (25 Stat. 94, 33 U. S. C. 591) and March 1, 1917 (39 Stat. 948, 33 U. S. C. 701); the Act of Congress approved December 22, 1944 (Public Law 534, 78th Congress); and the Act of Congress approved September 10, 1959 (Public Law 86-254). The Dis-

trict Court's jurisdiction was invoked under 28 U.S.C. 1345. A timely notice of appeal from said final judgment was filed on May 17, 1965. This Court's jurisdiction accordingly rests upon 28 U. S. C. 1291.

STATEMENT OF THE CASE

This is a suit to condemn real property in connection with the establishment of the Black Butte Dam and Reservoir project in Tehama and Glenn Counties in the State of California. This case is one of a series of proceedings instituted by the United States in order to acquire the necessary land for such project. The appellants herein were the owners of Tract No. 104 described in the complaint at the time such proceeding was instituted. After certain preliminary discovery and pre-trial procedures a jury trial was held commencing on October 15, 1964 for the purpose of determining just compensation for the taking of Tract 104. A verdict was rendered by said jury in the sum of $155,000.00 and judgment determining such sum to be just compensation was entered thereon on October 31, 1964. A motion to amend the judgment with respect to the addition of interest and a motion for new trial were submitted to the trial Court on November 13, 1964 and denied in each instance on March 15, 1965. Appellants appeal from that portion of the judgment which determines just compensation for the taking of said property to be the sum of $155,000.00.

FACTS OF THIS CASE

The subject project takes its name from Black Butte, a prominent landmark rising some 1100 feet, located on the subject property. R.T. 79.[1] The plaintiff condemned the entire holding comprising approximately 1,139 acres. R.T. 66. The land is approximately 10 or 12 miles west of Orland. R.T. 392. There were improvements including barns, a house, cabin, domestic water supply, fences and the like. R.T. 67-74, 156-159, 393-395.

There are four or five locations of rock outcropping or lava caps. R.T. 676, 677.

The land was traversed by Stoney Creek, approximately 488 acres lying south of Stoney Creek, R.T. 791. The property had been used for both sheep and cattle. It was the consensus of all of the valuation witnesses that this was its highest and best use. R.T. 82, 166, 430, 688.

Some of the property was level and under irrigation, some of it was subject of an effort on the part of the owner to install sprinkler irrigated clover during the year preceding the date of take, R.T. 107, and the remainder varied from steep to gently sloping range land. R.T. 675. There were substantial differences of opinion concerning the number of livestock which the

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[1]All references to the record herein are as follows:
C.T. Clerk's Transcript, Volume One;
R.T. Reporter's Transcript, Volumes One to Four inclusive;
See also Reporter's Note on page following page 875.
There are two sets of pages numbered 867-876, inclusive. A reference to the second set will be by the page number followed by (2) i.e. 867(2).

land could sustain, i.e., carrying capacity. R.T. 110, 208, 432, 696.

The valuation witnesses sharply differed as to the extent of irrigated and irrigable land, the relative value of the butte range, and the accessibility of the property lying on the north side of the creek. Of the subject property's total of 1139 acres, R.T. 66, defense witnesses Mallon and Michael testified that 167 acres were irrigated. R.T. 84, 85, 299. Government witness Campbell conceded that 77 acres north of Stoney Creek were irrigated land. R.T. 412. Government witness Rhodes said this area was 86 acres. R.T. 714. 90 acres on the south side of Stoney Creek were planted and sprinkler irrigated according to appellant Mallon. R.T. 84. Government witness Campbell admitted seeing the sprinkler system, R.T. 417, but did not value that portion as being irrigated because he saw no established stand. R.T. 409. Government witness Rhodes, however, observed clover in the area "doing fine" in parts. R.T. 687. He treated the total area under irrigation as comprising 176 acres, if the sprinkler area is included, R.T. 714, under an alternative method.

The sharp differences reflected in the views of the various witnesses concerning the subject property and the sale properties are shown in the following opinions of value of the subject property.

Mallon	$330,000.00—$281.00 per acre	R.T. 108
Michael	$307,000.00—$270.00 per acre	R.T. 207
Smith	$295,000.00—$259.00 per acre	R.T. 359
Campbell ...	$155,000.00—$135.00 per acre	R.T. 463
Rhodes	$150,000.00—$131.70 per acre	R.T. 691

SUMMARY OF ARGUMENT

The verdict of $155,000.00 rests upon the opinions of two government witnesses, Bert Campbell and Richard Rhodes. Their nearly identical opinions, $155,000.00 and $150,000.00, respectively, were based chiefly if not solely upon two sales of land located twenty miles away from the subject property. Although described by these witnesses as comparable lands having the same highest and best use as the subject property, i.e., a year round livestock operation, it was established by uncontroverted evidence that each property was purchased exclusively for residential subdivision purposes, without regard for agricultural or livestock use whatsoever. As a result, these two sales provide no proper standard for valuing the subject property and the opinions based thereon are without foundation. The verdict is therefore without substantial evidentiary support. The trial Court arbitrarily ruled such sales to be admissible and at the same time excluded four landowner sales which prevented one of their expert witnesses from fairly presenting his opinion and his reasons therefor.

Government witness Rhodes took a notebook containing some thirty pages to the stand and referred to it during direct and cross-examination. At the commencement of cross-examination defense counsel requested an opportunity to examine the contents. Except for two pages the request was denied by the trial court at the instance of government counsel.

Campbell testified that the American Appraisal Institute imposes high ethical standards on its members

and that it maintains a disciplinary committee authorized to act in cases where members appear on opposite sides and testify to substantially different figures. His testimony on this subject was summarized by government counsel in this question which Campbell answered affirmatively: "Unless you are a member of the Institute, then there is really no governing control over a man who merely calls himself an appraiser. Is that correct?"

However, the court would not allow defense counsel to ask Campbell and Rhodes about incidents wherein such witness and another member of such institute had testified to vastly different figures without disciplinary action by that organization. The court also denied defense counsel an opportunity to question Campbell about an incident when he, although appearing as an expert witness for the condemnor, made an offer in open court to purchase the property then being valued in an effort to create evidence and, further, that no disciplinary action was taken by such institute.

As a result of such adverse rulings by the trial court the self-serving statements of these witnesses went unchallenged, the doubt cast by them upon the landowners' witnesses unopposed.

The trial court further denied appellants' efforts to show the nature and extent of compensation being paid to these government witnesses, an inquiry commonly allowed on the subject of bias and motive. Moreover, such inquiry is specifically authorized by a California statute appropriate and applicable herein.

The two government witnesses had testified at length to the close comparability of the two sale properties upon which they chiefly relied. In order to rebut this testimony appellants produced a witness who had a lifetime of experience in the area of the two counties, Glenn and Tehama, who had been a tenant on both of the sale properties and was thoroughly familiar with them. His opinion that the Black Butte area land (subject property) was far superior to the two sale properties for producing feed for livestock was struck by the trial court and the jury admonished to disregard it, not because of any question of his qualification to express the opinion, but on the theory of improper rebuttal. The ruling was in error. The court's action deprived appellants of their right to rebut such evidence.

Finally, the court erred prejudicially in the instructions in several important aspects. Although the record includes extensive testimony by various opinion witnesses of a hearsay or otherwise generally inadmissible nature and although defense counsel had specifically withdrawn an objection to such testimony upon the assurance of the trial court that the evidence was being admitted for the limited purpose of illustrating the basis of the opinion, the court nevertheless refused to give a defense requested instruction to the effect that such matters were not direct evidence of value but could be considered in weighing opinion testimony. The error was compounded by other instructions given over timely defense objection that sales (of which there was no direct evidence) are the best evidence of

value. At the same time the court told the jury that before weighing the opinion of any witness it must find that the facts upon which it is based are true. Such instructions are conflicting and confusing and contrary to law.

Aside from the insubstantial basis for the verdict, each of the rulings of the trial court above indicated resulted in a denial to appellants of a substantial right and thereby deprived them of a fair trial. The verdict therefore should be set aside and a new trial ordered.

SPECIFICATION OF ERRORS RELIED UPON

1. The trial court erred in ruling without taking evidence, in excluding of its own motion defendants' proposed sale 2 and sustaining government objections to defendants' proposed sales 4, 5 and 6 as numbered and set forth in defendants' pre-trial list of proposed sales, C.T. 185, in rulings found in the R.T. 46, 55, 60, 62 and in overruling defendants' objections to government's proposed sales 4, 6 and 7 as set forth in government's proposed sales, C.T. 188, in court rulings found at R.T. 46, 55, 60, 62, 66, 199, 200.

2. The verdict is based solely or chiefly upon improper theories of law or assumptions of fact in that it is based upon the opinions of two witnesses whose opinions are founded upon two improper sales.

3. The trial court erred by denying to appellants the right to examine notes taken to the stand and referred to by government witness Rhodes in direct and cross-examination. The request and the ruling

thereon appears variously at R.T. 724, 725, 726, 751, 779, 780 and 785.

4. The trial court erred in denying appellants the right to cross-examine government witnesses concerning (a) the practice of the American Appraisal Institute where members appear on opposite sides to testify to disproportionate figures R.T. 483, 484, 485, 733, 735, and (b) in denying appellants an opportunity to cross-examine government expert witness Campbell on the subject of ethics mentioned in his direct examination, with respect to one incident where he attempted to create evidence while testifying as an expert witness for a condemning agency. R.T. 489, 490, 558-561.

5. The trial court refused to permit defense counsel to inquire of a government opinion witness concering his compensation. The basis urged was the subject of bias and motive and in addition specific state of California statutory authorization. The ruling and the basis urged appear R.T. 732, 778, 779, 785.

6. The trial court struck the rebuttal opinion of defense witness Snelson to the effect that the subject land was far superior to the two sale properties urged by the two government valuation witnesses as closely comparable, although his qualifications were not questioned, on the grounds of improper rebuttal. R.T. 874, 875.

7. The trial court refused to give defendants' proposed instruction No. 16 despite the fact that much hearsay and otherwise usually inadmissible evidence was admitted as illustrative of the basis of the wit-

nesses' opinions. R.T. 424. Such proposed instruction reads as follows:

> "In this case evaluation experts have been called by both sides, and have testified as to the factors considered by them in arriving at their opinion as to the market value of the land condemned. The factors considered by the expert are not in themselves direct evidence of the fair market value of the land condemned, but may be considered by you only for the purpose of determining what weight, if any, to accord to the testimony of the expert in his ultimate opinion as to the fair market value of the land in question as to the date of taking.
>
> *United States v. Land & Drybed of Rosamond Lake,* Cal. 143 F. Supp. 314 at 322
>
> .....
>
> Judge"
>
> Defendants' Proposed Instruction No. 16.

In addition, the court gave, over the objection that it constituted an improper comment upon the weight of the evidence, the following instruction:

> "Bona fide sales of comparable properties may (made) within a reasonable time, before the date of the valuation of the property involved in this action are the best evidence of its market value. To the extent that other properties were actually comparable to the property involved in this action their sales are the best evidence indicative of its fair market value . . ." R.T. 945

The foregoing matters were properly and timely called to the attention of the trial court prior to submission of the cause to the jury. R.T. 956 et seq.

I

THE RULINGS OF THE TRIAL COURT WITH RESPECT TO COMPARABLE SALES WERE ERRONEOUS. THEY PREVENTED APPELLANTS FROM FAIRLY PRESENTING THEIR CASE. (Specification No. 1.)

The pre-trial order provided for an exchange of proposed sales, for written objections thereto and for a hearing and receipt of evidence thereon to take place on the Friday preceding the Monday on which the case was set for trial. C.T. 182, 183. Subparagraph (e) appears at line 15, C.T. 183 and reads as follows:

> "The parties shall be bound by their respective lists of sales in that the witnesses for each side shall not be allowed to refer or rely upon any other sales as comparable sales in support of their opinions of value. A witness may, however, rebut or distinguish sales testified to by opposing witnesses."

The interpretation of that language became the subject of dispute between respective counsel. R.T. 306, 310, 315, 320. Inasmuch as neither side made any effort to establish by competent evidence the facts of any sales but simply relied upon the hearsay testimony of its respective appraisal witnesses, it is apparent that the transactions were used by both sides in the same manner in which comparable sales were used in the case of *United States v. Johnson* (9 Cir., 1960), 285 F. 2d 35, where this Court said on page 41:

> "The evidence of the so-called comparable sales in this case was not offered as substantive proof of the value of the property taken but only in support of the expert's opinion as to value."

To the same effect see *United States v. Baker* (9 Cir., 1960), 279 F. 2d 603, concurring opinion of Judge Merrill (p. 606-607).

No hearing was held before the trial. Instead, after selection of the jury, a hearing lasting one-half hour consisting solely of discussion between the Court and respective counsel resulted in the voluntary withdrawal of one government sale, R.T. 52, the exclusion of one landowner sale not previously objected to, the exclusion of three additional landowners' sales in accordance with government objection and rejection of all other objections.

The sales proposed, the objections interposed and the rulings are summarized as follows:

Defendants' Sales (in the order listed) C.T. 185	No. on Sales Map Def. Ex. 2	No. in Plaintiff's Objections C.T. 191	Ct. Ruling R.T. 46, 55, 60, 62
1. Prine-Arnett	1		
2. Papst-Jobe	3		Court excluded
3. Gaskin-Fox	.....	1	Overruled
4. Erickson-Harper & Essix	4	2a	Sustained
5. Erickson-Harper & Essix	5	2b	Sustained
6. Davis-Harper & Essix	6	2c	Sustained
7. Michael-Newby	7	3	Overruled
8. Ball-Briggs	2		

Plaintiff's Sales (in the order listed) C.T. 188	No. on Sales Map P. Ex. D	No. in Defendants' Objections C.T. 190	Ct. Ruling R.T. 46, 55, 60, 66
1. Finch-Lampley	.....	1	Withdrawn
2. Ball-Briggs	2		
3. Murdock-Whyler	1		
4. Parks-Sutfin	4	2	Overruled
5. Prine-Arnett	3		
6. Wilder-Boswell	5	3	Overruled
7. Wolfe-Petty	6	4	Overruled

Appellants respectfully contend that such rulings were arbitrary, in part based upon an erroneous conception of the law, and resulted greatly to the government's advantage.

A. Slight Effect on Government's Case.

Of the government's seven proposed sales, government witness Rhodes proposed to refer to the Finch sale but this was withdrawn by government counsel because the Court was willing to strike a defendant sale although not objected to as provided by the pretrial order. Rhodes testified that the withdrawn sale was of little importance and did not affect his valuation. R.T. 804, 805.

As is more fully developed in Section II, commencing on page 18 hereof it is quite apparent that neither of the government experts placed any substantial reliance on nearby sales. Both relied primarily on Wilder and Wolfe sales which occurred 20 miles north of the subject property (R.T. 455) and both gave some weight to Parks. Overruling defense objections to Wilder and Wolfe without receiving evidence thereon, in light of evidence ultimately adduced in rebuttal, enabled the government to present each witness without handicap and to argue his opinion at length. That each opinion is firmly based on the two sales of property sold for purposes entirely foreign to the highest and best use of the subject property according to each government witness and therefore improper as a basis for valuation is set forth in Section II hereof.

B. Substantial Adverse Effect on Defendants' Case.

Reference to the landowner's sales map Exhibit One will disclose the proximity of the four excluded sales. The first Erickson sale No. 4 on the map is about 7 or 8 miles west of the subject property. The other Erickson sales and the Papst sale are about 4 or 5 miles west.

Defense expert Michael used two approaches to value. In one he assigned various amounts to various portions of the property. R.T. 106. Such approach is proper.

> *Wilson v. United States* (10 Cir., 1965), 350 F. 2d 901, 904.

That portion of the subject property comprising approximately 167 acres of irrigated land was assigned a value of $625.00 per acre by this witness. R.T. 299. In a stormy session outside the presence of the jury it was developed that the witness had come to the trial prepared to cite the two Erickson and the Davis sales as sales of irrigated land. R.T. 303. The witness claimed a general or common knowledge of irrigated land sales but was unable to cite any specific transactions other than these three which the Court had excluded. Government counsel took the position that the valuation opinion should be stricken because it was based at least in part upon such excluded sales. R.T. 308. Defense counsel argued that the meaning of the pre-trial order was that sales excluded by the Court were excluded as "evidence" and could not be cited or mentioned to the jury. R.T. 310.

Nevertheless this witness was severely handicapped in the presentation of transactions which in his opinion supported his valuation. The exclusion of these sales in close proximity to the subject property simply because they were of smaller size is in marked contrast to the rejection of defense objections to government sales Wilder and Wolfe of property some twenty miles away, which, as developed in Section II were not proper for comparative purposes.

It would appear that the three sales were stricken by the Court upon government counsel's statement that Sale 4 (Erickson) was of 80 acres, Sale 5 (Erickson) of 40 acres and Sale 6 (Davis) of 36 acres. R.T. 58, 59. The point is these were sales of irrigated land.

Although the subject property comprised 1139 acres only a small part was under irrigation. Defense witnesses reported as much as 167 acres under irrigation, R.T. 84, 299, while one government witness conceded only 77 acres. R.T. 412, 417.

Apparently, the Court was of the impression that simply because government counsel stated that these three sales 4, 5 and 6, were of small parcels that they must be excluded. R.T. 58, 59, 60.

The exclusion of defendants' Papst Sale No. 2 solely because it occurred four months beyond an arbitrary five year rule adopted by the Court was quite harmful. This nearby sale was the only sale having buttes as did the subject property making it peculiarly helpful for valuation, according to defense expert Michael,

R.T. 51, 199, but he was never able to use the sale or to explain it to the jury. The trial court was apparently of the view that there is an existing rule which forbids reference to sales of property which occur more than five years prior to the date of valuation. R.T. 51, 199.

On the contrary, however, the general rule seems to be that the amount of time within which sales may properly be considered depends upon the individual circumstances and to some extent the exercise of sound discretion by the trial court. Indeed, this Court has had occasion to rule that the inclusion of a sale made some six or seven years prior to the date of valuation was proper.

> *Carlstrom v. United States* (9 Cir., 1960), 275 F. 2d 802, 809.

Cited in *Carlstrom* with approval is *United States v. Bechtold Co.* (8 Cir., 1942), 129 F. 2d 473, 479, which concerned a sale fourteen years before the valuation date. These sales were of the identical rather than similar property, but this fact would appear to be of no consequence under an arbitrary five year rule applied by the trial court herein.

In summary, it is respectfully contended that the court did not exercise discretion in excluding the four defendants' sales but on the contrary acted arbitrarily in so ruling and in refusing to receive offered evidence, R.T. 62, 199, as to the necessity of including such sales so that the appraiser might explain the reasons for his opinion.

In *United States v. Lowrie* (4 Cir., 1957), 246 F. 2d 472, the United States complained of the fact that its witness was not permitted to cite certain sales relied upon in forming his opinion. Two proposed government sales were there excluded on the grounds of lack of comparability, one a tract of land 63 acres in size compared to the property being valued of the size of 258 acres. That sale took place about two years before the date of valuation. The other excluded sale comprised 220 acres, a certain portion in cultivated land and woodland with certain improvements but not on a stream where the property being valued had approximately the same amount of cultivated land, woodland and improvements but was on an all year stream. It was held that the exclusion of such testimony was prejudicial error, the Court saying on page 474:

> "In the instant case the evidence was offered to explain how the expert arrived at his conclusions, and it should not be overlooked that an expert witness is always subject to cross-examination, which may well be devastating, when it is shown that properties to which he refers are so dissimilar as to furnish no adequate basis for comparison. The exercise of the discretion should be made with these considerations in mind."

The opinion continues that while the Court adheres to the rule of broad discretion being vested in the trial Court it holds that "the discretion is not absolute and may not be so exercised as to impede either party in an adequate presentation of his case." P. 474. The Judgment was reversed.

The same principle is found in the earlier case of *Hickey v. United States* (3 Cir. 1953) 208 F. 2d 269, Cert. den. 1954, 74 S. Ct. 519.

The government was denied an opportunity to present opinion testimony concerning the cost of necessary alterations and repairs to the subject property by way of rebuttal to landowner's evidence thereon. The Court said on page 277:

> "This resulted in limiting the government unduly in the prosecution of its case and constituted prejudicial error."

Here it is the landowner who was unduly limited in the prosecution of his case. But the result, i.e., reversal, should be the same.

II

THE VERDICT RESTS UPON THE OPINIONS OF TWO WITNESSES WHICH OPINIONS, BEING BASED UPON TWO IMPROPER SALES, ARE UNSUPPORTABLE. (Specification No. 2.)

Where the verdict rests upon expert opinion which is based solely or chiefly upon improper theories of law or assumptions of fact, the verdict will be set aside.

United States v. Honolulu Plantation Co. (9 Cir., 1950), 182 F. 2d 172, 178;

Likens-Foster Monterey Corp. v. United States (9 Cir., 1962), 308 F. 2d 595, 597;

United States v. Michoud Industrial Facilities (5 Cir., 1963), 322 F. 2d 698, 706.

The verdict of $155,000.00 herein clearly rests upon the opinions of government witnesses Campbell ($155,000.00) and Rhodes ($150,000.00).

Both of these witnesses based their valuation opinions chiefly, if not solely, upon two sales, Boswell-Wilder and Petty-Wolfe. Both said that the highest and best use of the Mallon property was for a year round livestock operation. Campbell R.T. 430, Rhodes R.T. 688, 765. Both regarded the Boswell sale as most comparable with Wolfe a close second. Campbell R.T. 457, 458, 540, Rhodes R.T. 701, 705, 715, 765, 766, 788.

Campbell said that the only difference between Boswell and the Mallon property was the cost of drilling a well R.T. 540. Rhodes said that the highest and best use of both Boswell and Wolfe lands were a year round livestock operation, the same as the subject property, R.T. 788 with the same capability. R.T. 788.[2]

Campbell obtained his information about the sale not from the buyer or the seller, R.T. 537, but from another government appraiser. R.T. 542, later confirmed by seller, R.T. 543. Rhodes spoke to the seller and to the broker but not to the buyer. R.T. 762.

But these two properties were not sold for livestock or other agricultural purposes. With respect to the Boswell sale D. M. McLemore testified as follows R.T. 821:

> "Q. Mr. McLemore, where do you live?
> A. Oakland, California.
> * * *

[2]The record disclosing their near exclusive reliance on these two sales is further delineated in Appendix B.

Q. Parcel 5. And were you a purchaser of that property?

A. Yes, sir.

Q. And who besides you was a purchaser?

A. Robert Boswell; a fellow by the name of Jack Ronayene, R-o-n-a-y-e-n-e, who was a subdivider. He's from Concord.

Q. What is your business or occupation, Mr. McLemore?

A. I'm a mortgage loan broker.

Q. And would you tell me what knowledge you had about the property at the time you purchased it?

A. The knowledge that I had about the property was that it was about two miles from the city limits, city hall of Red Bluff. It was close to the sewer lines and utility lines. What we had in mind was we purchased that property for the sole purpose of subdivision.

Q. And how long a time did you study the property before purchasing it?

A. One day.

Q. I see. And did you have in mind or did you have any information which influenced your purchase of the property with reference to any new developments?

A. Yes. We bought it strictly on the idea that Aerojet was moving their moon rocket program over towards, in the area of Vina, and we surveyed the area by plane, contacted all the brokers in the area, and purchased the property, as I say, within one day, had our deed of trust with release clauses set up so we could subdivide certain sections of it, and we get automatic release clauses, and so forth.

Q. Now, can you tell us about the surface of the land that you purchased there?

A. Oh, I called it the Red Rock ranch.

Q. For what reason?

A. There's no grass on it. There's just no food. All it was was just——

Mr. Renda: Excuse me, your Honor, I have no objection to this witness testifying on the basis of his knowledge which he has. Now, if he is a livestock man and he is able to testify as to the type of feed that would be available for livestock ranches, I think he should be allowed to do so. But he has not indicated any qualifications to testify concerning feed values.

Now, if Mr. Blade can lay a foundation for it, I would have no objection to it. But until such time as he does, I move to strike this witness's opinion as to the feed quality of this ranch.

Mr. Blade: Well, I'm just asking the witness's knowledge of his own property from observation, your Honor.

The Court: The last part of his answer might be stricken."

With respect to the Wolfe sale, Mr. Wayne Petty testified as follows R.T. 861:

"Q. Your name is Wayne Petty?

A. Yes, sir.

Q. And where do you live, Mr. Petty?

A. Corning, California.

Q. And what is your business or occupation?

A. Petroleum wholesale and resale, is the primary business. I have some sidelines, but that is the main business.

Q. Petroleum wholesale and resale, you say?

A. Retail.

Q. Retail. Now, I'd like to call your attention to an exhibit, Plaintiff's Exhibit D, which is a

map of the area, including Corning, which I'm now indicating, which is in pink. North is to the top of the map. Highway 99 runs through the town of Orland, down through the town of Willows, and over in this general area that I'm now indicating is the subject property, the Mallon property, in the vicinity of the Black Buttes. Are you generally familiar with the area?

A. Yes.

Q. And, Mr. Petty—oh, I have not indicated the Town of Red Bluff, shown in the pink area here. And we show up here two irregular red areas blocked out: number 6, as I understand it, represents some property which was sold by Mr. and Mrs. Wolfe to you. Do you recognize that as the approximate location of the property which was purchased from Mr. and Mrs. Wolfe?

A. Yes, that is.

* * *

Q. Mr. Petty, was that property purchased as a livestock operation?

A. No; no sir.

Q. And for what purpose was it purchased?

A. I purchased it as an investment, and I was particularly interested in that north section there because there's a mile and three-quarters of road frontage which I subdivided.

Q. Could we get the microphone a little closer to you so we'd be sure and hear you? You say there was a mile and a fraction of road frontage?

A. Mile and three-quarters.

Q. And you say after purchasing you did subdivide it?

A. I subdivided it, yes.

Q. All right. And have you since operated the entire property as a livestock operation?

A. No. I leased it out to various operators.

Q. And you say you subdivided how many acres?

A. About 135.

Q. And have you sold any portions of it?

A. I came out with 39 lots, and I think I've sold 10 of those lots; yes.

Q. At the time that you purchased the property, did you make any investigation as to the, well, the character of the property in respect to a livestock operation?

A. Not in respect to livestock or farming."

In *United States v. Michoud Industrial Facilities,* C.C.A. 5, (1963) 322 F. 2d 698, a similar principle was involved. There, the value of 1,000.22 acres of land improved with buildings having 1,767,000 square feet of rentable area were taken. The value was found by commissioners and the commissioners received the report of several experts. A review of the evidence satisfied the appellate court that the commissioners had adopted the opinion of one Mr. Lemarie; that Mr. Lemarie testified that the most comparable land was the land along the intracoastal canal at Harvey and that sales at Harvey were very largely the reason for his opinion of value; that Mr. Lemarie's opinion was supported by the sale of small tracts of land two or three acres fronting the Harvey Canal some fifteen miles distant. P. 706.

The Court said on page 706 that while it recognizes the general proposition that the appellate court would not interfere with the judgment of the trial court concerning the admissibility of sales whether remote

in time or size, that, nevertheless, such rule "falls far short of constituting a rule that the appellate courts may not reverse a finding of value which it finds to have been based on a comparison of the condemned property with other tracts which neither by location nor quantity of land involved or other characteristics bear any resemblance to each other in the market." The verdict was set aside, the judgment reversed.

In short, the appellate court found that the sales relied upon by the opinion witness were so dissimilar in distance and in size and character as to afford no reasonable basis to support the opinion and the verdict based upon such opinion therefore could not stand.

In this case, it is respectfully contended that the two sales, although twenty miles distant and arguably similar as to characteristics, nevertheless, cannot support the opinions of value of the subject property in view of the uncontradicted evidence that neither buyer bought with any thought of agricultural use because it is conceded by all parties that the highest and best use of the subject property is for a livestock operation and related agricultural activities.

The Court correctly instructed the jury: "The just compensation is the fair market value of the property taken." R.T. 944, and that fair market value "is the amount that in all reasonable probabilities would have been arrived at by fair negotiations between an informed owner willing but not compelled to sell and an informed purchaser willing but not compelled to buy." R.T. 946.

In the ascertainment of market value by the comparable sale method, not only must the sale properties have a reasonable degree of similarity, *United States v. Michoud,* supra, but no sale is admissible nor may any verdict based thereon stand if it appears that either party was acting under compulsion or force. See generally 5 Nichols on Eminent Domain 3rd ed., p. 461 et seq., para. 21.32 Forced Sales. For the same reason sales to a potential condemnor are not proper. Nichols, supra p. 465 et seq., para. 21.33 Transactions with Condemnor.

The necessity of excluding forced or compulsive sales where the goal is to ascertain what bargaining unaffected by force or compulsion would produce is clear.

It would seem equally clear that sales wherein one of the parties was not reasonably informed about the property or where one of the parties was misinformed in some major particular would likewise provide no guidance in ascertaining what bargaining between well informed persons would produce.

The principle is illustrated in the case of *Union Electric Co. v. Jones* (Mo.) 356 S.W. 2d 857. In this case a farm comprising 245 acres was condemned.

The court said on page 862:

> "Appellants . . . assert that the trial court erred in excluding the testimony of James Sutterfield as to the price he received for his farm about seven months prior to the condemnation of the appellants' land. Sutterfield testified out of the presence of the jury that his farm was located

> about 20 miles from appellants' land and that he sold it to the American Metal Smelting Company 'for mining purposes' . . . Here, there was no showing that appellants' land was adaptable for mining, yet the Sutterfield land was sold for mining purposes. . . . Here, appellants' offer of proof showed it was inadmissible. There was no error in rejecting it."

Had it ultimately developed that the sale property although thought to be suitable for mining was in fact, not suitable, the case would be almost identical. Here the most important sale (Boswell) was to a purchaser who understood that Aerojet was moving its Moon Space Program into the area, that the property was adjacent to the City with all utilities and that he and his associates who are in the subdividing business would subdivide it. It is difficult to conceive of a more clear case where property sold for purposes entirely foreign to the purpose which each expert witness claimed was the highest and best use of the subject property. It seems obvious that the poorest farm in the world might bring a handsome price if the purchaser believed, whether justifiably or not, that it contained a valuable attribute other than for agricultural purposes e.g., gold, oil or residential subdivision.

In the present case the verdict rests firmly upon the opinions of the two government witnesses who relied not upon sales in the immediate vicinity, but upon two sales of properties some twenty miles north on the outskirts of the City of Red Bluff neither of

which sold for agricultural purposes, as a measure of value. It is submitted that the verdict in this case rests upon no more firm foundation than did the verdict in the *Michoud* case. It should be set aside for the same reasons.

III

APPELLANTS WERE DENIED A SUBSTANTIAL RIGHT BY THE TRIAL COURT WHEN IT REFUSED TO PERMIT THEIR COUNSEL AN OPPORTUNITY TO EXAMINE THE NOTES REFERRED TO BY GOVERNMENT WITNESS RHODES IN DIRECT AND CROSS-EXAMINATION. (Specification No. 3.)

At the close of direct examination of government expert Rhodes defense counsel asked the witness if he could look at the notes which he had taken to the stand and to which he had referred in direct examination. The witness agreed. R.T. 724. However, government counsel objected. After some colloquy between the Court and respective counsel, the Court directed defense counsel to return the book to the witness. R.T. 726. Although the witness continued to refer to the notes and there was some discussion between Court and counsel from time to time, at no time thereafter was defense counsel permitted to see more than three pages taken from the book by the witness. It was developed from the witness that the book was a loose leaf book and contained approximately 30 pages including photographs, prints of maps and printed material. R.T. 728. It was further developed from the witness that he had testified to information reflected in the notes in addition to the

three sheets which defense counsel was permitted to see, R.T. 729, and that one of the two sheets was a page 8 of a report made by the witness wherein he listed sales which were not the same as those he had testified to. R.T. 730. In appendix A is set forth all of the testimony as well as the discussion between Court and counsel with reference to this matter.

No rule seems to be more firmly ingrained in the law than that where a witness has taken notes to the stand and has referred to them that the cross-examiner is entitled to see all of such notes, to cross-examine the witness thereon and in some instances to read them to the jury or to place them in evidence.

Although sustaining the trial court which had refused to permit defense counsel to examine a grand jury transcript which the Court had used to refresh witnesses' memory but which the witnesses had not been allowed to see, the Supreme Court, said in *United States v. Socony-Vacuum Oil Co.,* (1940) 310 U.S. 150, 84 L. ed. 1129, 60 S. Ct. 811, on page 1173 of the Lawyer's Edition as follows:

> "Normally, of course, the material so used must be shown to opposing counsel upon demand if it is handed to the witness."

The rule is set forth with numerous supporting authorities in:

58 *American Jurisprudence,* Witnesses p. 335, Sec. 601;

McCormick, *Law of Evidence* (1954) p. 17;

Wigmore on *Evidence* (3rd Ed.) Vol. 3 p. 108, para. 762.

The rule is part of the statutes of California. Section 2047 of the California Code of Civil Procedure provides that a witness may refresh his memory respecting any fact or any writing and continues:

> "But in such case the writing must be produced, and may be seen by the adverse party who may if he choose cross-examine the witness upon it and may read it to the jury . . ."

In *Kelliher v. Ray* (1941) 43 C.A. 2d 252, 110 P. 2d 712, it was held reversible error to deny opposing counsel the right to inspect notes used by a police officer in testifying concerning his investigation.

Although confined to criminal prosecutions a similar principle is reflected in Section 3500(b), Title 18, U.S.C.A., Crimes and Criminal Procedure.

The appellate court of Illinois had occasion to rule on this matter in 1963 in *Justice v. Pennsylvania Railroad Co.,* 41 Ill. App. 2d 352, 191 N.E. 2d 72, where the general rule is stated and applied. A doctor had testified for one party and opposing counsel was refused permission to look at the notes on the grounds that they contained notes on treatment of other members of the family. The appellate court found this reason to be insufficient. The judgment was reversed. On page 74 of the N.E. 2d Report, the Court said:

> "Whether or not anything else in his notes could have been used to discredit his testimony or weaken it, was a matter for counsel to decide, not the court."

In *Fifth Avenue-Fourteenth Street Corp. v. Commissioner of Internal Revenue,* 2 Cir. 1944, 147 F. 2d

453, it was held to be reversible error to refuse to permit defense counsel to examine notes referred to by an appraisal witness where the issue of market value was an important factor. The Court said on page 458:

> "... We think it was clearly improper to deny the request of the taxpayer's counsel and that, in the circumstances, considering the high appraisal figure to which the witness testified and the importance of the valuation issue, there was an abuse of discretion in this respect."

To the same effect:

Jackson v. United States, 5 Cir. (1958) 250 F. 2d 897, 900;

Montgomery v. United States, 5 Cir. (1953) 203 F. 2d 887, 894;

Harris v. State of Texas, Ct. of Crim. Apps. (1962) 358 S.W. 2d 130.

In two relatively recent cases in the Fifth Circuit Court of Appeals denial of cross-examination resulted in reversal. The inability to examine the notes obviously resulted in an inability to cross-examine the witness on the contents and therefore falls within the same general principle. In *Deglos v. The Fidelity & Casualty Company of New York,* 5 Cir. (1963) 313 F. 2d 809, the cause was reversed because under the rule there obtaining the appellant was compelled to call a person as a witness and examine him under direct examination rather than under cross-examination. The remarks of the appellate court with reference thereto apply with equal force herein. On page 813 the Court said:

"Our system of justice rests necessarily on the historic assumption that civilized moral people try their dead level best to tell the truth no matter how much it hurts or helps. But being a mechanism for the resolution of man's disputes, the instrument of cross-examination is an integral part of that system in order to penetrate all of the conflicting impulses or obstacles to lay bare the whole truth. And yet from the nature of the strict procedural limitations imposed by the Judge, this could not be effectively done.

"Real cross-examination was entirely missing.

. . .

"This was not therefore the case of admission or exclusion of some bit of testimony asserted on appellate review to have been erroneous. This was the denial of the use of a tool of advocacy which our long judicial heritage marks as one of the most effective in the quest of truth. This was a substantial right. The experience of the bar is that it has substantial value . . ."

A similar ruling appears in *Delta Engineering Corporation v. Scott* (5 Cir., 1963), 322 F. 2d 11, 19, where the trial Court denied counsel an opportunity to cross-examine another witness on a subject with the admonition that it could be proved by that party's own witnesses. On page 20 the Court said:

"Of course, this is a complete frustration of a major purpose of cross-examination . . ."

The decision was reversed.

In *Alford v. United States,* 282 U.S. 687, 51 S. Ct. 218, 75 L. Ed. 624, it was held that sustaining an ob-

> "Unless you are a member of the Institute, then there is really no governing control over a man who merely calls himself an appraiser. Is that correct?" R.T. 385.

The witness Rhodes testified that he is a member of the American Appraisal Institute and described the requirements for admission. R.T. 671-672.

The purpose of such statements is obvious. In order to refute them appellants attempted, by appropriate cross-examination, to establish that on various occasions members of such institute had opposed one another in Court, and had testified to vastly different figures without disciplinary action. However, the Court supported the objections of government counsel to such interrogation.

B. Non-action of Institute in Specific Cases of Disproportionate Testimony.

The subject first arose in the cross-examination of the witness Campbell. He was asked whether or not his opinion and that of another member of the institute differed in another case by over $100,000.00. R.T. 483. Government counsel objected and the objection was sustained. R.T. 484. Government counsel made the statement in the presence of the jury that the other case was pending on appeal. Despite the fact that government counsel had successfully objected to any questions by appellants' attorney on this subject, government counsel asked for and received permission at that point to interrupt cross-examination and to go into the subject with the witness. The Court pointed

out that it was quite possible by so doing he would be "opening the gate". R.T. 485. The following questions were thereupon asked of government witness Campbell by government counsel:

> "Q. Mr. Campbell, has a report been made to the institute concerning this discrepancy in the case Mr. Blade mentions?
>
> A. Yes.
>
> Q. Is it not a fact, sir, that they are reserving action until it is resolved by the courts?
>
> A. True.
>
> Q. And that it is entirely possible that action may be taken on either side depending on what the committee determines?
>
> A. Right.
>
> Q. Mr. Renda, that is all." R.T. 485.

Thereupon cross-examination continued and there was an effort made to find out the amount of the discrepancy when the government counsel again objected and this time it was pointed out that government counsel had opened the door but the Court said it would close the door, and prohibited any further questions on the subject. R.T. 486.

The subject again came up in the cross-examination of government witness Rhodes. He was asked if he had had occasion to appear and testify where an opposing member and he had testified to a difference of opinion as great as $140,000.00. The objection was sustained. R.T. 733. When appellants' counsel attempted to find out if the figures differed as greatly as they do in the present case the Court interrupted and said the ruling precluded that. R.T. 735.

Trial in a case such as this is a contest between the conflicting opinions of expert witnesses. Here the government deliberately created an issue concerning the responsibility of expert witnesses epitomized in its counsel's statement: "Unless you are a member of the Institute, then there is really no governing control over a man who merely calls himself an appraiser."

One logical way to meet this issue would be to prove that on various occasions members of such Institute testified on opposite sides to vastly disproportionate figures *without* disciplinary action by such Institute.

This effort was denied appellants by the trial Court. Even more harmful was the willingness of the trial Court to allow government counsel to open the door for what he felt were necessary remedial statement-questions, and yet to close the door to defense counsel.

Thus, one side was allowed by self-serving testimony to discredit the witnesses for the other side. But the other side was denied an opportunity to defend such claims.

C. Conduct of Campbell in Previous Trial. Non-action of Institute.

Further to meet this direct testimony on cross-examination defense counsel attempted to ask government witness Campbell if he had while appearing as an expert valuation witness made an offer in open Court to purchase the property subject of valuation for the purpose of creating evidence and that no discipline had ensued. This effort was prevented by timely objection of government counsel sustained by

the trial Court. R.T. 489. Later, an offer of proof was made, R.T. 558, which was denied. R.T. 561.

It would seem that an expert witness testifying for a condemning agency would certainly exhibit dubious ethics in making an offer in open Court at a time when he was appearing as a so-called impartial expert witness, which defendants herein proposed to show. R.T. 558 et seq. Moreover, defendants further proposed to show that the incident had allegedly been reported to the appropriate members of the American Appraisal Institute who had absolved the witness of any criticism. R.T. 561. These two facts certainly tend to cast doubt upon the claims of high ethics made by this witness for members of said organization in his direct examination. They were properly for the jury to weigh but appellants were denied an opportunity to submit them to the jury.

D. Denial of Cross-Examination Prejudicial.

Full cross-examination on a subject opened up by the other side is a matter of right, the denial of which can constitute reversible error.

Thus, in *Quiles v. United States* (9 Cir., 1965), 344 F. 2d 490, a prosecution for narcotics and conspiracy, this Court said at page 494:

> "A full cross-examination of a witness upon the subjects of his examination in chief is the absolute right of a party against whom he is called."

This Court cited the case of *Dixon v. United States* (5th Cir., 1964), 333 F. 2d 348, as authority for such statement.

With special reference to proceedings in eminent domain and the right of full cross-examination of opinion witnesses, see:

United States v. 12.3 Acres of Land (6th Cir., 1956), 229 F. 2d 587 (cross-examination denied. Judgment reversed);

United States v. 679.19 Acres of Land, D.C., 113 F. Supp. 590, 594 (cross-examination held properly allowed).

V

THE TRIAL COURT ERRED IN DENYING APPELLANTS AN OPPORTUNITY TO INQUIRE INTO THE COMPENSATION PAID TO A GOVERNMENT EXPERT WITNESS. (Specification No. 5.)

It would appear to be so fundamental as hardly to require citation of authority that a party may adduce evidence reflecting upon the motive, bias or interest of an adverse witness.

McCormick on Evidence (1954), Page 83, Para. 40, Bias;

Wigmore, *Evidence,* 3rd Ed., Vol. 3, Sec. 949, page 499;

Cf. Fisher v. United States, 9 Cir., 231 F. 2d 99, 104.

The problem is particularly acute where expert valuation witnesses appear and testify.

Section 1256.2 of the California Code of Civil Procedure provides:

> "In any condemnation proceeding, either party shall be allowed to question any witness as to all expenses and fees paid or to be paid to such witness by the other party."

When defense counsel inquired of government witness Rhodes as to his compensation for attending Court, an objection by government counsel was sustained and the Court ruled that appellant could not show what the witness was being paid for attending Court. R.T. 732, 785.

Rule 71A (a) provides that the Federal Rules of Civil Procedure "govern the procedure for condemnation of real or personal property under the power of eminent domain except as otherwise provided in this rule."

An examination of the entire Rule 71A discloses no provision with respect to the admissibility of evidence. Hence, Rule 43(a) becomes applicable. It states that in any case, the statute or rule, i.e., federal statute or decisional rule or statute or decisional rule of the state wherein the United States Court is held, "which favors the reception of the evidence governs . . ."

The question concerning compensation is clearly admissible under the state statute and under the federal rules of civil procedure, admissible in this case. Government counsel, however, disagreed. At one point, R.T. 198, he advised the Court at line 13:

> "If you (defense counsel) are going to cite state cases, I think we ought to have the authorities clear that state cases are in no way persuasive or binding upon this court in a federal matter . . ."

Again on page 782 he advised the Court that two named United States District Court Judges of this district "have now ruled that in their opinion no other rules of procedure are applicable to condemnation proceedings other than Rule 71 in connection with ascertaining value . . ." He also stated at line 14, R.T. 782:

> "But in any event, the Department of Justice and the majority of the Courts now take the position that state statutes and state cases carry no weight or persuasion in connection with an eminent domain proceeding, save and except for the interpretation of what is law."

It may be conceded that insofar as provisions of state constitutions and state statutes on the general subject of eminent domain differ from the provision in the United States Constitution, that a federal Court would have to follow the federal constitution. However, it is difficult to see how a federal rule adopted by the United States Supreme Court which states that the most favorable rule concerning the admission of evidence shall govern, can be said to have no application to eminent domain cases where the same United States Supreme Court has in its Rule 71A (a) clearly set forth that all of the federal rules of civil procedure shall apply except as otherwise provided in such rule.

It may be conceded that government counsel has the authority to state that the United States Department of Justice has taken the position that the Federal Rules of Civil Procedure above set forth do not mean what they appear clearly to state. However,

at least several United States Courts do not agree. The decisions here cited, are not clear cut holdings for in each Rule 43(a) is cited in the footnote or by way of approval rather than as a compelling rule of law. Nevertheless, the principle therein stated is apparently approved and applied.

Wolff v. Commonwealth of Puerto Rico (1 Cir., 1965), 341 F. 2d 945;

United States v. 25.406 Acres of Land (4 Cir., 1949), 172 F. 2d 990.

VI

THE COURT ERRED IN STRIKING THE OPINION TESTIMONY OF THE WITNESS SNELSON. (Specification No. 6.)

The defendants called Raymond S. Snelson as part of their rebuttal. R.T. 865. His entire life had been devoted to livestock and farming in Glenn and Tehama Counties. R.T. 866. At the time of the trial he was a tenant on the Boswell to Wilder property, R.T. 865, and had been since its sale four years prior thereto. He was familiar with the property before the sale having been a tenant on the adjoining property. R.T. 868. Such adjoining property was the Petty to Wolfe government sale where he was a tenant prior to the sale in February of 1960. R.T. 873.

The witness testified to familiarity with the Black Butte Dam area since 1934. R.T. 866.

With this background of a lifetime of farming and agriculture in the two adjoining counties, familiarity with the Black Butte Dam area for nearly thirty

years, occupation and tenancy of the adjoining government sale properties, Petty to Wolfe, for an undisclosed period prior to the sale in 1959 and the primary or chief government sale Boswell to Wilder for four years prior to the trial, the witness was asked to compare the two sale properties with property in the Black Butte Dam area for livestock purposes. R.T. 874. His answer is as follows:

> "A. The Black Butte Dam area and all of that surrounding area is far superior to anything in the Red Bluff area as far as producing feed for livestock goes."

Government counsel had previously objected to a similar type of question on the theory that it was calling for his opinion which he said was not proper rebuttal. Such objection was overruled. R.T. 874. Upon giving the answer above quoted, direct examination of Mr. Snelson closed.

Without further comment or objection on the part of government counsel, the trial Court then interrupted cross-examination to strike the opinion answer above quoted and admonished the jury to disregard it. R.T. 875, line 7.

This was not evidence which could properly be put in as part of the landowners' case in chief. Indeed, the landowners had objected to the two sales as being in an entirely different economic area some twenty miles away but the Court had arbitrarily overruled those objections in the hearing mentioned in Section 1 hereof. There was no mention of the two primary government sales Boswell to Wilder and Petty to

Wolfe in the landowners' case in chief. Obviously, therefore, it would have been improper to attempt to discredit the comparability of such two alleged comparable sales with the subject property until reaching the rebuttal stage.

It is to be noted that the objection was not made that the witness was not qualified. The objection was simply that the question called for an opinion and that an opinion on rebuttal is improper. Neither government counsel nor the trial Court, however, saw any objection to opinion testimony by way of rebuttal presented during the government's case. Thus, after presenting his appraisal of the subject property together with all of the reasons and factors behind it, government witness Campbell was asked for opinion testimony concerning landowners' sale No. 7 Michael to Newby. This sale was mentioned by landowner witness Michael in the course of his testimony supporting his opinion. R.T. 200-205, 272-275. It was not a sale mentioned or relied upon by either government witness. Nevertheless, Campbell was asked and expressed his opinion that that property was not comparable to the subject property. R.T. 469. In the same manner government witness Rhodes, after having testified at length concerning his appraisal of the subject property, had his attention drawn to a sale, not cited or relied upon by him, Gaskins to Fox, in Butte County. Rhodes expressed the opinion that the property was in a different area where speculation was going on and that it would not reflect market value of the subject property. R.T. 724.

It may also be noted that the landowner Mallon in expressing his opinion of value stated that in forming his opinion he obtained an estimate of the carrying capacity of his property and compared it to several nearby properties arriving at a sale price of approximately $1,000.00 per animal unit carrying capacity and applied that measure to his subject property in forming his opinion. R.T. 109-110.

Throughout the testimony of government witnesses Campbell and Rhodes may be found expressions of opinion concerning carrying capacity on various properties and yet both witnesses disclaimed having placed any great reliance upon this method. R.T. 584, 801. Obviously, these opinions were expressed by way of rebuttal to the landowners' case. Indeed the government properly called the opinion witness Begg, R.T. 616, and others in order to rebut landowner testimony concerning carrying capacity on the subject property and on other lands.

Thus, repeatedly and extensively, the government was permitted to adduce opinion testimony designed to rebut the landowners' case in chief. Yet, the trial Court at the suggestion of government counsel struck the opinion of the obviously well qualified witness Snelson simply because it constituted an opinion concerning the quality and comparability of the two primary government sales to the subject property.

In *United States v. Hickey* (3rd Cir., 1953), 208 F. 2d 269 it was held reversible error to deny the government the right to present an expert witness concerning the cost of rehabilitating the property in view of

the fact that landowner expert witnesses had indicated that a rehabilitation or conversion was necessary to the highest and best use. (p. 276.) While it is stated that this was part of the government's case in chief it was obviously aimed as a rebuttal of the landowners' testimony and quite properly so.

Additionally, in *Hickey* the government expert testified about the poor condition of the plumbing and heating system of the subject property. After cross-examination the witness testified on re-direct examination that the witness had obtained additional information after the contractors had entered the building and begun certain construction work including the replacement of certain pipes which tended to confirm the witness' early opinion. However, the trial Judge struck the re-direct testimony. (p. 277.) The Court held:

> "Storey's evidence on re-direct examination was admissible and should have been admitted. The ruling of the court striking it out constituted prejudicial error. The court refused to allow the United States reasonable latitude in proving this phase of its case." (p. 278.)

Moreover, as part of the landowners' case an expert had testified concerning two separate meanings of the phrases "market value" and "fair market value". To counteract this the government proposed to call an expert witness, a lawyer and a member of the Board of Assessors, to define the meaning of market value with relation to assessment but the Court refused to permit such testimony. The Court said on page 278:

> "Under these circumstances the United States should have been allowed to present the evidence of the tax assessor in rebuttal.
>
> ". . . The United States should have been allowed to rebut this inference, if it could. The exclusion of Steiger's testimony seriously prejudiced the government's case."

It is clear, therefore, that where the government was not permitted to rebut important elements introduced into the case by the landowner in *United States v. Hickey,* prejudicial error resulted in a reversal. In this case, it is the landowner who was denied the opportunity to rebut the evidence given by both government experts concerning the high degree of comparability of the Wilder-Boswell and Petty-Wolfe sales to the subject property, the evidence as to which is set forth and delineated extensively in Section II and in Appendix B hereof. Striking this qualified witness' opinion was therefore prejudicial to the landowners' case.

VII

THE COURT ERRED IN FAILING TO GIVE DEFENDANTS' PROPOSED INSTRUCTION NO. 16, IN COMMENTING UPON SALES AND ON WEIGHING OPINION EVIDENCE. (Specification No. 7.)

The practice of allowing expert witnesses to testify as to the "reasons" for their opinion, including therein the results of their investigation, their conclusions with respect thereto and all of the factors considered by them in forming their opinion is well established

and is not contested. However, the extent to which such testimony includes hearsay sometimes two or three times removed, conjecture and speculation, is well known. The valuation witnesses for both sides gave such testimony extensively herein.

Defense counsel withdrew an objection to hearsay testimony upon the assurance of the trial Court that it was being admitted solely to illustrate the basis of the witness' opinion. R.T. 424. With this in mind defendants submitted Proposed Instruction No. 16 set forth in full supra page 10.

The proposed instruction was based upon the final paragraph in the opinion of Judge James M. Carter in *United States v. Land In Dry Bed of Rosamond Lake* (1956), 143 F. Supp. 314, 322 where he stated:

> "As in all cases involving the opinion of the expert as to fair market value, the jury should be instructed that the factors considered by the expert are not in themselves direct evidence of the fair market value of the land condemned, but may be considered by the jury only for the purpose of determining what weight if any the jury accords to the testimony of the expert in his ultimate opinion as to the fair market value of the land in question as of the date of taking."

This Court has stated that where evidence is admitted for a limited purpose the Court must give a proper cautionary instruction.

> *Standard Oil Co. of Calif. v. Moore* (9 Cir., 1957), 251 F. 2d 188, 218-219.

The problem was compounded by the giving of an instruction concerning the superior evidentiary

value of sales without direct evidence thereof, supra page 10.

There was no direct evidence of sales. Except for rebuttal witnesses McLemore, R.T. 820, and Petty, R.T. 861, who were purchasers in two sales of disputed applicability, supra, Section II hereof, no participant in any sale testified. Such comments concerning sales were therefore improper.

United States v. 5,139.5 Acres of Land (4th Cir., 1952), 200 F. 2d 659, 662;

United States v. Baker, supra (9 Cir., 1960), 279 F. 2d 603, 606. (See also concurring opinion of Judge Merrill, pp. 606-607.)

But the Court also told the jury that "You must before considering the weight of the opinion of such witness first find from the evidence the facts upon which his opinion is based are true . . ." R.T. 949.

Thus, although allowing such extensive hearsay and other inadmissible testimony into evidence solely to illustrate the basis of the witness' opinion, R.T. 424, the Court not only refused to so instruct the jury although timely so requested, it effectively told the jury just the contrary for it singled out "evidence" of sales (though there was none) as superior for valuation purposes.

Then it completed the circle by telling the jury that before weighing the opinion of any witness it must find that the facts upon which it is based are true. Not only is this series of instructions confusing and misleading, it is contrary to law. It is more than an invitation to treat all of the hearsay, conjectural and

speculative remarks of various witnesses as "evidence" of the "facts". It is virtually a direction to do so.

In view of the sharp conflict in the opinion evidence and the verdict returned it is submitted that such instructions were prejudicial.

Trout v. Pennsylvania Railroad Co. (3rd Cir., 1962), 300 F. 2d 826, 829. (Confusing and misleading instruction held to be prejudicial. Reversed.)

CONCLUSION

It is impossible to determine how the course of the trial might have been influenced had defense counsel been allowed to see the thirty page notebook taken to the stand by the witness Rhodes and referred to by him during direct and cross-examination.

Had the Court permitted evidence to be introduced at the start of the trial concerning the two sales located some twenty miles north of the subject property it is possible these sales might have been excluded, as they should have, and the course of the trial radically affected.

Had the Court not denied to appellants the other substantial rights herein noted, the right to rebut testimony exalting members of the appraisal institute and ethical conduct of its witnesses, the right to inquire concerning compensation, the right to present the qualified witness Snelson in rebuttal in respect to the above two sales, the course of the trial might well have

been altered. The same holds true of the errors in instructions noted.

For each and all of these grounds appellants request that the verdict be set aside and a new trial awarded.

Dated, Oroville, California,
May 17, 1966.

Respectfully submitted,
BLADE & FARMER,
By ROBERT V. BLADE,
Attorneys for Appellants.

CERTIFICATE OF COUNSEL

I certify that, in connection with the preparation of this brief, I have examined Rules 18 and 19 of the United States Court of Appeals for the Ninth Circuit, and that, in my opinion, the foregoing brief is in full compliance with those rules.

ROBERT V. BLADE,
Attorney for Appellants.

(Appendices A, B and C Follow)

Appendices

Appendix A

Cross-Examination

By Mr. Blade:

Q. Mr. Rhodes, could I take a look at the notes you've been testifying from?

A. Yes.

Q. Okay.

Mr. Renda: Well, just a moment, your Honor, is Mr. Blade just going to leaf through these notes? If so, I'd like to have a copy of Mr. Michael's notes and Mr. Smith's notes. I think he certainly has a right to question this man on anything that he's referred to, but I don't think he has a right to just take the notes and take it back to his table.

The Court: I don't think so either.

Mr. Blade: I didn't hear what he said.

The Court: I don't think that you should take the notes.

Mr. Blade: It's my understanding of law, your Honor, when a witness is using his notes that he's been referring to opposing counsel has the right to look at them.

The Court: That part of the notes he's testified to, you may have him show you.

Mr. Blade: This is all I know just what he handed me and what I saw him leafing back and forth through the notes.

The Court: He might have some letters in there.

Mr. Blade: You get the whole package, as I understand the law. You don't just get a single line or a single page.

The Court: You don't just take in the whole country. He may have a love letter in there, you can't tell.

Mr. Blade: I would assume he didn't take the love letter to the stand, but I don't think I can get half a statement or half a sentence.

The Court: You can question him about any one of the notes but not take the book as a whole.

Mr. Renda: Excuse me, Mr. Blade. Did you hear the Court?

Mr. Blade: Well, if your Honor please, I can't even ask a question about the notes unless I first take a look at them.

The Court: Well, if you don't know what you want to ask, the notes won't be any good to you.

Mr. Blade: I'll know when I check them.

The Court: You may return the book to the witness.

Mr. Blade: Very well, your Honor.

The Court: I won't preclude you from having notes on any one of these matters that he's testified to.

Mr. Blade: All right. We'll start at the beginning, first page.

Mr. Renda: I object, your Honor. He's going through the whole book.

Mr. Blade: Just a moment, I'd like to ask my question first. If your Honor please, as I understand your Honor, I can find out from the witness every note he testified to, and as to that I can look at it. Is that your Honor's ruling?

The Court: Yes.

Mr. Blade:

Q. All right. Mr. Rhodes, have you testified to anything on the first page?

A. No.

The Court: Well, now, I'll sustain the objection. Just ask him about the ones he has. You're going right through the book page by page. Understand what I mean?

Mr. Renda: If your Honor please, so the record is straight, I have no objection to Mr. Blade just taking that book entirely and looking at it on the assumption that Mr. Michael furnishes me his notes so I have the same opportunity, and Mr. Smith furnishes his notes.

Now, they all had notes, and I asked them when a particular question came up as to what they were referring to, and I have no objection to Mr. Blade doing the same thing. Those are Mr. Rhodes' notes and if he wants to give them to him, certainly he may do so, but I think that properly Mr. Blade should ask him as to those matters which he has testified to, and if Mr. Rhodes again wants to give it to him to look at it at recess, that's up to Mr. Rhodes.

Mr. Blade: Well, if your Honor please——

The Court: Well, you're chasing a rainbow. You know the ranches that he's testified to. You can ask him to show you the notes on that particular ranch.

Mr. Blade: Well, first, I'll ask him to testify about the notes on the Mallon ranch. Will you show me the notes on the Mallon property?

The Witness: Your Honor, I have no notes here that I didn't refer to in my testimony. Now, in showing these notes, should that just be the notes that I referred to?

The Court: Just the notes you referred to in your testimony.

It might save time if you give him all the notes on those matters you actually testified to.

The Witness: That's what I'm actually doing, your Honor.

The Court: All right.

The Witness: I don't think I referred to anything but just these two.

Mr. Blade: All right. For the sake of the record, your Honor, may I establish the size and general extent of the notes which I'm being denied the opportunity to read and examine the witness on?

The Court: I don't know what you want to do, but go ahead and do it.

Mr. Blade: All right.

By Mr. Blade:

Q. Mr. Rhodes, you have taken out of this looseleaf book two sheets of paper in response to the Court's suggestion, and there remains, can you tell me approximately how many pages of typewritten material that you had at the witness stand during the course of direct examination which is not being made available to me?

A. There are some typewritten in, also others that are prints of maps, and I would say there are roughly 30 sheets.

Q. And you have photographs?

A. Yes.

Q. And some of this printed material, I take it, is the same as went into the written report which you turned into the Government?

A. Yes. In fact, all of that material is right here that went into that report.

Q. And is the figure which you testified to today reflected in your notes?

A. Yes, it is.

Q. And is it on these two pieces of paper?

A. No, it isn't. I had that—I remembered that figure. I didn't have it to refer back to, and I don't believe it is; no.

Q. The valuation figure is not on the notes, the two pages, that you've made available to me, is that correct?

A. No.

Q. Is it on the notes that you have in front of you?

A. Yes, it is. The first is the letter of transmittal with my report. This sheet was a summation or compilation of my sales data, which had many numbers and figures; hard to remember them all. And the other one was a sheet I made in getting information on the Gaskin to Fox sale.

Q. Well, I take it then, if I'm to ask some questions on these two sheets of paper, insofar as my questions are the same general questions which were asked of you during direct examination, it would be entirely unnecessary for you to refer to your notebook to answer them, is that right?

A. If you asked the same questions, that's true. I don't think I'd have to refer——

Q. Yes. Now, this first sheet has a number 8 on it. I assume this is a page 8 out of a report that you submitted, is that right?

A. That's correct.

Q. All right. And do I understand that the sales which you listed in this report are the same sales to which you've testified today?

A. I have testified to sales listed on that page, yes.

Q. All right.

A. However, you asked if they were all the same, and my answer there would be no.

(Recess.)

By Mr. Blade:

Q. Mr. Rhodes, before the recess we discussed briefly the first sale, the Murdock to Whyler sale, and you said you got some carrying capacity from Mrs. Espel, and what was that?

A. I believe that was one thousand—wait a minute, I'll check. As I stated, I gave very little

reliance on the carrying capacity method, and did not use that as my principal amount. It's 1,000 sheep for six months.

Q. And you got that information from the looseleaf book in front of you?

A. Yes.

Q. All right. I just wanted to get that into the record. And you concluded then the carrying capacity of that property to be what? Did you make a conclusion as to its carrying capacity?

A. Only a rough conclusion; something around 100 to 107 animal units. Again, as I say, I did not rely on that as my basis of value.

The Court: You may have those notes if you want them.

Mr. Blade: The ones that he just looked at?

The Court: Yes.

Mr. Blade: Thank you, your Honor.

The Court: I'm saying that on account of my other ruling.

The Witness: You want the ones I just looked at?

Mr. Blade: Yes, that's the way I understand the Court's ruling.

Mr. Renda: May I have an opportunity to see these, too, your Honor?

The Court: Yes. I want to make myself clear. Any matters that he testifies to that he has notes on counsel for the defendant is entitled to see the notes.

Mr. Renda: Yes, your Honor. I understand that.

Mr. Blade: All right. Thank you.

Mr. Blade: If your Honor please, I wanted to ask the witness one or two questions outside of the presence of the Jury in keeping with what I

understand to be the rulings before the Jury was impaneled.

Cross-Examination (Continued)

By Mr. Blade:

Q. Mr. Rhodes, on page 8, which you have allowed me to examine, there is the Finch to Lamphley sale, given as a date of 12/1/55, and this sale was included as the fourth in the series of seven sales on that page, is that correct?

A. Yes.

Q. And there's the word written out. I take it that was written on there after you were informed that the sale had been withdrawn by Mr. Renda as a sale to be used in this case?

A. Yes, sir.

Q. Is that correct?

A. Yes, sir. It's my understanding that the Judge ruled the sale out on the basis of time.

Q. And I take it insofar as making your appraisal is concerned, this was one of the sales that you took into consideration and relied upon in arriving at your opinion of market value of the subject property?

A. I considered it. However, I gave it the least weight of any because it was so old.

Q. So old? The least weight of all of them?

A. Yes.

Mr. Blade: All right. That's all I wanted to ask of this witness at this point.

The other rule that I had in mind was the examination of notes. And I'll have to dig up some evidence on that. But I do feel that I can satisfy your Honor that this is a well-established rule of law, at least in California, that where a witness is referring to notes, opposing counsel is entitled to

see all of them, not just the ones he looked at or said he looked at, but all that he takes to the stand with him. So if he says on page 1, fact so-and-so, and the examiner finds that over on page 10 that he's got a note to the contrary, he's entitled to ask him about it.

The Court: There's no question but what you're entitled to ask him about it, but not on something that he hasn't used.

Mr. Blade: That's correct, your Honor.

The Court: You can take his whole office file, you can have him bring all his records from his office——

Mr. Blade: Well——

The Court: —and everything, and look at everything that he's got. Now, I rule that you can have any note that he has used in connection with his appraisal on this property that he testified to on his direct examination, and I think that's as far as I should go.

Mr. Blade: Well, if your Honor please, maybe I misunderstand. It's my understanding that when the witness takes a book, a series of notes, to the stand with him, that the rule I'm talking about certainly doesn't apply to his office or some place else, but it does apply to that which he takes to the stand and actually refers to. If he doesn't open it, why, of course, he hasn't referred to it. It's impossible for me to say, or anyone, whether it's page 1 or page 10. That's why——

The Court: You can ask him if he has any other notes on the subject that he's testifying on.

Mr. Blade: Yes.

The Court: If he says he has, you can have the notes.

Mr. Blade: But my first point is, my understanding it, that having taken the book to the stand and referred to it in the course of direct examination, that I'm entitled to examine it. And I didn't get a chance to examine it because, as I understood your Honor's ruling, only those pages that he was willing to pick out, which constituted just two, was I able to look at. Now, that's the way I understood the ruling. And I abide by it. But I think I'm entitled to look at the entire book as long as he took it to the stand and referred to it.

Mr. Renda: Have you finished now, Mr. Blade?

Mr. Renda: Now, on the notes—and this is legal argument rather than to Mr. Rhodes—first of all as to the most liberal rule applicable—I know the rule to which Mr. Blade refers; it's rule 41B, and it is to be read in connection with Rule 71 —however, let me point out to the Court that there is a great deal of disagreement about whether or not any rules of procedure other than that which are specified in Rule 71A of the Federal Rules of Procedure are applicable in Condemnation proceedings, because I'm sure the Court is aware there's a distinction between substantive and procedural law. And, as a matter of fact, Judge Carter and Judge Halpert of this district have now ruled that in their opinion no other rules of procedure are applicable to condemnation proceedings other than Rule 71 in connection with ascertaining value, and that refers to what Mr. Blade is pointing out here.

Now, the third point as to the notes, I think the record here should reflect that first of all Mr.

Michael and Mr. Smith, who were the witnesses for the Defendants, appeared on the stand with looseleaf notebooks, sheets of paper, and periodically throughout their testimony, both direct and cross, they would reach into pockets and pull out little pieces of paper. Now, I had the right, I am certain, if I desired, to look at individual pieces of paper to which they were referring in response to a question. However, I did not feel that necessary, and I did not call upon the witness to allow me to do that. Certainly I had no right to ask him to empty their pockets to show whatever they had in that looseleaf notebook, and let me sit down before I cross-examined them, and look through it all before I asked a single question. Now, I think the record should reflect in that case that Mr. Rhodes has before him a looseleaf binder in which there are obviously some loose papers. There are some papers in the binder, and he has already testified as to the nature generally of what is contained therein. Now, there is included in there, I'm certain, some matters that were not testified to on direct, and might have been referred to on cross-examination. If they were not referred to on direct and not referred to on cross-examination, Mr. Blade has no right whatsoever to those notes. And I think that the Court's ruling is fully and entirely proper in the circumstances, and I think we are in clear understanding that any document to which Mr. Rhodes refers in his direct or cross-examination, Mr. Blade has the right to read and observe, but certainly he has no right to take all the documents that this witness happens to have on the stand with him at this time.

Mr. Blade: Well, I might answer counsel first, your Honor, with reference to Rule 71, counsel has referred to Judge Carter, who has made some ruling, he says. Judge Carter has specifically sustained the asking of the question of compensation of an expert witness. Now, whether he does that because he recognizes that the state rule of procedure, controls, or for some other reason, I don't know. But Rule 71 simply says that except as otherwise provided in this rule, the rule, the remaining civil rule, shall apply, and the literal application of the rule, of course, clearly requires the procedural rules of the State, and the procedure that counsel states, substantive procedure, does exist. The line of demarkation is not always too clear, but certainly in the admission of evidence and the asking of questions, it seems they are clear.

Insofar as examining the notes are concerned, I can't help what kind of notes were taken to the stand. All I know is, as I always understood the rule, if a man takes a series of notes to the stand and riffles through them, you're entitled to see them.

Now, I don't want to hold your Honor any longer.

The Court. No. I'm not changing any of my rulings that I've heretofore made.

Appendix B

RELIANCE ON TWO RED BLUFF SALES

The relative insignificance to the government experts of all government sales except the two Red Bluff sales is illustrated by the sales price per acre as compared to their opinions per acre of the subject property.

	Per acre
1. Whyler	$ 35.00
2. Briggs	$ 54.00
3. Arnett	$ 71.00
4. Sutfin	$ 96.00
5. Boswell	$118.00
6. Petty	$100.00
Mallon Property	$135.00—Campbell $131.70—Rhodes

Campbell's valuation report to the government mentioned only sales 4, 5 and 6, sales 2 and 3 being added for the purpose of trial testimony. R.T. 494.

With reference to sales two and three government witness Campbell said as to Ball to Briggs that it represents the lower limit of value having no irrigated land as on the subject property and that the subject property would sell for "much more". (R.T. 441. Government witness Rhodes stated that there was no irrigated land and that it was much larger and was a winter range ranch. R.T. 699. This witness described the highest and best use of the subject property as a year round livestock ranch. R.T. 688, 765.

Sale No. 3, Prine to Arnett, was referred to by Campbell as low in quality with no irrigated land as

on the subject property; that Mallon being partially irrigated would sell for more. R.T. 446. Rhodes described it as a basically winter range with no irrigation. R.T. 699.

Government sale No. 4 Parks to Sutfin was referred to by Campbell who said after having referred to the previous two sales more by way of contrast than by comparability, that for the first time we are beginning to get toward a sale which tends to be more comparable to the Mallon property. R.T. 448. However, he regarded it as inferior with reference to the irrigated area. R.T. 449. Rhodes simply stated that it was more smooth. R.T. 700.

Campbell did not refer to government sale one, Whyler. Rhodes did. He said that it was not as good as the subject property, R.T. 693; did not have the attributes of the subject property and used it only for background as it was of much less value. R.T. 695.

On the other hand, Campbell said that Boswell, sale five, is 20 miles north of the subject property but that the only difference in the quality of that property to the subject property was the cost of putting down a well. R.T. 457. He referred to it as "most comparable as to size and use but inferior but getting pretty close". R.T. 458. He asserted that the range was identical to the subject property. R.T. 452. Rhodes said that the highest and best use of this property was for a year round livestock operation. R.T. 766. He said sales one, two and three are less reliable as indicators of value because the differences with the subject property are greater. R.T. 711. However, as to the sale five, Boswell, he described this as the "best sale" with

the other two sales (Wolfe to Petty and Parks to Sutfin) tending to confirm it. R.T. 715. He added that in reaching his value he placed primary weight on these three sales, four, five and six. R.T. 717. He gave the greatest weight to sales four, five and six because of the existence of irrigated land. R.T. 757, 786. He also said that the Boswell sale five was an economic unit, i.e., capable of supporting a person without outside lands, R.T. 767, and made the same comment as to the subject property. R.T. 766.

Campbell made the statement that a buyer would consider that by simply placing a well on the Boswell property it would become equal to the subject property. R.T. 540. Rhodes stated of Boswell that it was a good indicator of value and it was property that would be considered by the same type of purchaser. R.T. 705.

Campbell described the Wolfe to Petty—government sale six as comparable. R.T. 458. He admitted that there was a strawberry patch under irrigation, R.T. 460, that it had a poorer quality range than the subject property, R.T. 461, and that he treated the strawberry patch as though it were the same as irrigated pasture. R.T. 462. Rhodes said of this property (Petty) that a purchaser would consider it along with the subject property as having some irrigated land and some dry land. R.T. 706. He stated that it was a "good indicator of value" and that a buyer in the market would consider this property also if looking for a ranch of the type of the subject property. R.T. 709.

Appendix C

INDEX OF EXHIBITS